

Filed 4/12/19 Porter v. AG Arcadia, LLC CA2/5
Opinion following rehearing

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

PATRICIA PORTER et al.,

Plaintiffs and Respondents,

v.

AG ARCADIA, LLC et al.,

Defendants and Appellants.

B285461

(Los Angeles County
Super. Ct. No. BC512207)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward B. Moreton, Judge. Affirmed as modified.

Buchalter, Harry W.R. Chamberlain II and Robert M. Dato; Petrullo, John Patrick Petrullo and Grace Song for Defendants and Appellants.

Law Office of Martin N. Buchanan, Martin N. Buchanan; Moran Law, Michael F. Moran, Lisa T. Flint and Alex H. Feldman for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs Patricia Porter, through her successor in interest Linda Solis, and Solis, individually (collectively, plaintiffs) sued AG Arcadia, LLC, doing business as Country Villa Huntington Drive Healthcare Center (Country Villa), a skilled nursing facility, AG Facilities Operations, LLC (AG Facilities), a holding company, and Country Villa Service Corp., doing business as Country Villa Health Services (Service Corp.) (collectively, defendants) for elder abuse under Welfare and Institutions Code¹ section 15657, a provision of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (Elder Abuse Act), negligence, violation of the Patient's Bill of Rights, and wrongful death. The matter proceeded to arbitration. In a written decision, the arbitrator found defendants acted with recklessness in failing to carry out their care plan for Porter. The arbitrator awarded \$1 million for wrongful death and awarded additional damages for elder abuse. Country Villa and AG Facilities appeal from the judgment confirming the arbitration award.²

Country Villa and AG Facilities argue the arbitrator exceeded her authority, and the arbitration award should be vacated, because the award of \$1 million in noneconomic damages for wrongful death violates Civil Code section 3333.2, a provision of the Medical Injury Compensation Reform Act of 1975 (MICRA); the arbitrator failed to make findings against AG

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Service Corp. is not a party to the appeal.

Facilities; and the unallocated award of noneconomic damages violates Proposition 51. They also argue they were substantially prejudiced by the arbitrator's refusal to hear evidence material to the controversy. We amend the judgment nunc pro tunc and affirm the amended judgment.

BACKGROUND

A. *Country Villa, AG Facilities, and Service Corp.*³

Country Villa is a skilled nursing facility. AG Facilities “operates and manages the property where [Country Villa] . . . is located” and is a “holding company affiliated with [Country Villa].” Service Corp. is an administrative services company.

Under a 2003 Management Agreement, Service Corp. managed Country Villa. In March 2012, Country Villa and Service Corp. entered into a Facility Consulting Agreement under which Service Corp. provided “consulting services” to Country Villa. No operational changes took place after the 2012 agreement became effective.

³ The facts are taken primarily from the arbitration award. Courts may not review for sufficiency the evidence supporting an arbitrator's award. (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 367, fn. 1 (*Advanced Micro Devices*).) We therefore take the arbitrator's findings as correct without examining a record of the arbitration hearing itself; indeed, as in *Advanced Micro Devices*, the appellate record does not contain a reporter's transcript (or other official record) of the oral arbitration proceedings or the exhibits introduced during the hearing. (See *ibid.*)

Country Villa and Service Corp. share the profits of Country Villa's operation. Service Corp. also receives 4.25 percent of Country Villa's gross profits.

B. *Porter's Care at Country Villa*

On July 4, 2012, Patricia Porter, who was in her 70's, was admitted to Country Villa following her discharge from Methodist Hospital. She required antibiotic treatment for a sore on one of her toes. Porter's daughter, Linda Solis, and Solis's husband had full-time jobs and they felt Porter would receive the attention she needed at Country Villa.

When Porter was admitted at Country Villa, a nurse noticed a sore on her coccyx. On July 4, Dr. Robert Siew ordered that Porter receive a low air mattress, which is important in the care of a patient with pressure sores. Although a patient with an order for a low air mattress is supposed to receive one as soon as possible, Porter did not receive a low air mattress until July 12.

The standard of care requires that patients with pressure sores be turned every two hours. Country Villa "did not appropriately turn Mrs. Porter[,] "[left] her sitting in a wheelchair for six hours and [left] her in dirty diapers, contribut[ing] to the development of or complications from pressure sores due to the bacteria which migrate into the sores."

On August 1, 2012, Porter was returned to Methodist Hospital following an apparent stroke. On her admission to the hospital, she had a Stage 4 pressure sore on her coccyx.

On November 26, 2012, Porter passed away. Her death certificate listed dementia as the cause of death. But Porter

actually died of sepsis related to her wound from the pressure sore and urinary infections.

C. *Arbitration Proceedings*

In June 2013, plaintiffs filed suit against defendants asserting claims for elder abuse under section 15657, negligence, willful misconduct, violation of the Patient's Bill of Rights, and wrongful death. The trial court granted defendants' motion to compel arbitration. The trial court ordered all of plaintiffs' claims into arbitration except the claim for violation of the Patient's Bill of Rights, which the court stayed.

The arbitration took place during three days in January 2016, as the parties had agreed. The arbitrator (Hon. Judith R. Chirlin, retired) heard opening statements and testimony from a number of witnesses. When it appeared the parties needed additional time, the arbitrator agreed to continue the hearing for an additional four hours on February 5, 2016. At the arbitrator's request, the parties prepared a notebook for the arbitrator which contained only the exhibits received in evidence.

The parties submitted written closing arguments. In their written closing arguments, Country Villa and AG Facilities asserted they had been prejudiced by the amount of time allocated to the arbitration. They asked that the arbitration be reopened so they could call additional witnesses. The arbitrator denied the request.

On April 14, 2016, the arbitrator issued a 10-page arbitration award finding "by clear and convincing evidence that the Stage 4 coccyx sore that [Porter] had when she left [Country Villa] on August 1st was caused by the lack of appropriate care

[she] received at [Country Villa] and that it was a substantial factor in causing her death.” The arbitrator also found that Service Corp. was a “joint venturer[]” with Country Villa “in the running and management of [Country Villa].” The arbitration award listed the evidence and additional factual determinations that supported the arbitrator’s conclusions.

The arbitrator further found that defendants “acted with recklessness in failing to follow their care plan for turning Mrs. Porter, in failing to follow their own policies and procedures and in failing to follow Dr. Siew’s order for a low air mattress.”

Addressing the assertion by Country Villa and AG Facilities that they were prejudiced by the amount of time allocated to the arbitration and wanted to reopen the arbitration to call additional witnesses, the arbitrator noted that the parties had agreed to the amount of time allocated to the arbitration, the arbitrator had agreed to schedule an additional four hours on a separate day, and Country Villa and AG Facilities did not object or assert prejudice when the arbitration was extended for an additional four hours.

On the elder abuse claim, the arbitrator awarded \$83,750.73 for Porter’s past economic damages and \$250,000 for Porter’s noneconomic damages under section 15657. On the wrongful death claim, the arbitrator awarded Solis \$1 million in noneconomic damages.⁴ The arbitrator later granted plaintiffs’ motion for attorney fees and costs.

⁴ Although the arbitrator’s award mentioned only the elder abuse and wrongful death claims, the parties agree the arbitration also determined the negligence claim.

D. *Motion to Vacate and Petition to Confirm Award*

On May 16, 2016, defendants moved to vacate the arbitration award. Defendants argued the arbitrator exceeded her powers by awarding noneconomic damages against defendants in lump sums rather than in proportion to each defendant's percentage of fault under Proposition 51.⁵ Defendants also contended the arbitrator exceeded her powers by awarding \$1 million on the wrongful death cause of action in violation of defendants' right to limit noneconomic damages to \$250,000 under Civil Code section 3333.2, a provision of MICRA. In addition, defendants argued the arbitrator exceeded her powers by failing to make any findings against AG Facilities. Finally, defendants asserted the arbitrator substantially prejudiced their rights by refusing to grant them additional time to present material testimony from treating nurses and defendants' medical expert Karen Josephson, M.D.

Following a hearing, the trial court denied defendants' motion to vacate the award.⁶ The court found the arbitrator did not exceed her authority in her decisions concerning Proposition 51 and MICRA's \$250,000 cap. The court also found defendants did not meet their burden of proving they were

⁵ Civil Code sections 1431 to 1431.5, part of the Fair Responsibility Act of 1986, are commonly referred to as Proposition 51. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1192.)

⁶ We dismissed the appeal from this order because it was not appealable. (*Porter v. AG Arcadia, LLC* (Feb. 28, 2017, B276183) [nonpub. opn.])

prejudiced by the denial of their request for additional time to present evidence.

On May 22, 2017, plaintiffs petitioned to confirm the award. Defendants opposed the petition. On August 22, 2017, the trial court confirmed the award, including \$294,168 in attorney fees for plaintiffs under the Elder Abuse Act, and entered judgment.

Country Villa and AG Facilities appealed.⁷

STANDARDS OF REVIEW

““On appeal from an order confirming an arbitration award, we review the trial court’s order (not the arbitration award) under a de novo standard. [Citations.] To the extent that the trial court’s ruling rests upon a determination of disputed factual issues, we apply the substantial evidence test to those issues.” [Citation.]” (*ECC Capital Corp. v. Manatt, Phelps & Phillips, LLP* (2017) 9 Cal.App.5th 885, 900 (*ECC Capital*); accord, *Douglass v. Serenivision, Inc.* (2018) 20 Cal.App.5th 376, 386.) “[T]he question whether the arbitrator exceeded [her]

⁷ We initially dismissed the appeal after oral argument because the Patient’s Bill of Rights claim remained unresolved, depriving the judgment of finality. (See *Kurwa v. Kislinger* (2013) 57 Cal.4th 1097, 1100 [“Under California’s ‘one final judgment’ rule, a judgment that fails to dispose of all the causes of action pending between the parties is generally not appealable”].) Plaintiffs then dismissed the Patient’s Bill of Rights claim with prejudice and the parties jointly petitioned for rehearing. We granted rehearing and now address the appeal on the merits. (See *Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 309.)

powers and thus whether we should vacate [her] award on that basis is generally reviewed on appeal de novo.’ [Citation.]” (*ECC Capital, supra*, 9 Cal.App.5th at p. 900.)

DISCUSSION

I. *Judicial Review of Arbitration Awards*

“In general, judicial review of an arbitration award is extremely limited.” (*SingerLewak LLP v. Gantman* (2015) 241 Cal.App.4th 610, 615 (*SingerLewak*).) “[A]n arbitrator’s decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 6 (*Moncharsh*).) “This is because parties who enter into arbitration agreements are presumed to know the arbitrator’s decision will be final and binding; ‘arbitral finality is a core component of the parties’ agreement to submit to arbitration.’ [Citation.]” (*SingerLewak, supra*, 241 Cal.App.4th at p. 616.)

Code of Civil Procedure section 1286.2 allows a court to vacate an arbitration award when the arbitrator has exceeded his or her powers “and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.” (Code Civ. Proc., § 1286.2, subd. (a)(4).) “Arbitrators may exceed their powers by issuing an award that violates a party’s unwaivable statutory rights or that contravenes an explicit legislative expression of public policy.” (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 916.) “It is well settled that ‘arbitrators do not exceed their powers merely because they

assign an erroneous reason for their decision.’ [Citations.]”
(*Moncharsh, supra*, 3 Cal.4th at p. 28.)

In addition, a court may vacate an arbitration award if a party’s rights were substantially prejudiced by an arbitrator’s refusal to hear evidence material to the controversy. (Code Civ. Proc., § 1286.2, subd. (a)(5).)

II. *The Arbitrator’s Wrongful Death Award is not Subject to Judicial Review Based on Alleged Violations of MICRA and Proposition 51 or Lack of Findings Concerning AG Facilities*

Country Villa and AG Facilities assert the arbitrator’s \$1 million wrongful death award is subject to judicial review. They argue the arbitrator exceeded her authority by failing to apply the \$250,000 MICRA cap (Civ. Code, § 3333.2) and failing to apportion noneconomic damages under Proposition 51, contravening the legislative expressions of public policy underlying MICRA and Proposition 51. Country Villa and AG Facilities also contend the arbitrator exceeded her authority by failing to make findings concerning AG Facilities, violating the arbitration agreement’s requirement to provide written findings of fact and conclusions of law concerning each party.

In response, plaintiffs argue Country Villa and AG Facilities have raised nothing more than ordinary claims of legal error by the arbitrator, which a court may not review.

We conclude the arbitrator’s wrongful death award is not subject to judicial review under Code of Civil Procedure section 1286.2, subdivision (a)(4), based on these alleged errors. While arbitrators may exceed their powers by issuing an award that

violates a party's unwaivable statutory rights (*Richey, supra*, 60 Cal.4th at p. 916), Country Villa and AG Facilities have not identified any unwaivable statutory rights violated by the wrongful death award.

And while arbitrators may exceed their authority by making an award that contravenes an explicit legislative expression of public policy (*Richey, supra*, 60 Cal.4th at p. 916), that expression must directly affect the propriety of the arbitration itself. (See *SingerLewak, supra*, 241 Cal.App.4th at pp. 617-618, 624 [judicial review of an arbitration award under Code Civ. Proc., § 1286.2, subd. (a)(4), is proper only if the explicit expression of public policy indicates the issue in question was not meant to be subject to resolution by an arbitrator].) Judicial review is not available when "the sole issue is merely an alleged error in the interpretation or application of the law governing [a] claim properly subject to arbitration." (*SingerLewak, supra*, at p. 620.)

Country Villa and AG Facilities do not assert, and have not shown, the arbitrator's wrongful death award violated any legislative expression of public policy affecting the propriety of the arbitration in this case. Instead, they raise "merely an alleged error in the interpretation or application of the law governing the [wrongful death] claim[, which was] properly subject to arbitration." (*SingerLewak, supra*, 241 Cal.App.4th at p. 620.) Therefore, judicial review of the wrongful death award is not appropriate.

III. *The Arbitrator’s Denial of Country Villa’s and AG Facility’s Request to Present Additional Evidence*

A. **Judicial review is appropriate**

Country Villa and AG Facilities contend the arbitration award should be vacated because they were substantially prejudiced by the arbitrator’s denial of their request to present material evidence from Dr. Karen Josephson and treating nurses. The issue is judicially reviewable because an arbitration award can be vacated if a party’s rights were substantially prejudiced by an arbitrator’s refusal to hear evidence material to the controversy. (Code Civ. Proc., § 1286.2, subd. (a)(5); see *Royal Alliance Associates, Inc. v. Liebhaber* (2016) 2 Cal.App.5th 1092, 1105 (*Royal Alliance*) [“arbitration procedures that interfere with a party’s right to a fair hearing are reviewable on appeal”].)

B. **Country Villa and AG Facilities did not carry their burden of proving they were substantially prejudiced by the arbitrator’s alleged refusal to hear material evidence**

Code of Civil Procedure section 1286.2, subdivision (a)(5), permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case. (*Burlage v. Superior Court* (2009) 178 Cal.App.4th 524, 529 (*Burlage*); *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 439 (*Hall*).) The statute provides that, subject to the procedural requirements of Code of Civil Procedure section 1286.4, “the court shall vacate the [arbitration] award if the court determines . . . [¶] (5) The rights of the party

were substantially prejudiced by . . . the refusal of the arbitrators to hear evidence material to the controversy . . .” (Code Civ. Proc., § 1286.2, subd. (a)(5).)

When a party contends the arbitrator refused to hear material evidence, the trial court’s inquiry ordinarily focuses on the existence of prejudice, because assessing the materiality of excluded evidence would usually require a “judicial second-guessing” of the arbitrator’s factual and legal determinations. (*Hall, supra*, 18 Cal.App.4th at p. 438; see *id.* at p. 439 [“Where, as here, a party complains of excluded material evidence, the reviewing court should generally focus first on prejudice, not materiality”].) The refusal to hear evidence is substantially prejudicial only if “the arbitrator might well have made a different award had the evidence been allowed,” in view of the arbitrator’s legal theory regarding the case. (*Id.* at p. 439.) “The prejudice query under section 1286.2, subdivision (a)(5) is not . . . ‘ultimately a question of the sufficiency of evidence,’ an inquiry generally outside the permissible scope of review of arbitration awards.” (*Royal Alliance, supra*, 2 Cal.App.5th at p. 1109.) “Rather, it is an examination of the proffered but rejected evidence to determine the impact of its omission under the theory adopted by the arbitrators.” (*Ibid.*)

Here, Country Villa and AG Facilities moved in the trial court to vacate the arbitration award, arguing they suffered substantial prejudice as the result of the arbitrator’s alleged failure to consider material evidence. They did not provide an official record of the oral arbitration proceedings to support their motion. Plaintiffs opposed the motion, arguing the arbitrator allowed defendants to present all their desired witnesses and was

not required to reopen the arbitration to consider new evidence presented for the first time after the hearing ended.

The parties filed competing declarations by their counsel to support their respective positions. Defendants submitted declarations by Stephen Garcia, counsel for Country Villa and AG Facilities, and William Wilson, counsel for Service Corp. Garcia declared: Multiple times during the arbitration hearing, defendants' counsel requested additional time for defendants to present their case. The arbitrator denied the requests. The arbitrator allowed an additional half day solely for plaintiffs to call three more witnesses and to engage in closing argument. If defendants had been allowed more time, they would have called multiple nurses to refute plaintiffs' assertion that Porter was not regularly turned and repositioned. Because of the time constraints, defendants could not call Dr. Josephson as an expert to testify on causation and damages. Plaintiffs were given approximately 85 percent of the total time at arbitration.

Wilson declared that he and Garcia objected multiple times to the arbitrator's refusal to fairly apportion time between the parties.

Both Wilson and Garcia declared that after the arbitration, plaintiffs submitted evidence to the arbitrator that had not been submitted at the time of arbitration. The arbitrator admitted plaintiffs' evidence and then refused to allow defendants to reopen the hearing to present evidence in rebuttal.

Plaintiffs submitted a declaration from their counsel, Lisa Trinh Flint. Flint declared: On October 5, 2015, plaintiffs moved to exclude Service Corp.'s designated expert Dr. Josephson because Service Corp. failed to produce her for a deposition. The arbitrator ordered that if Dr. Josephson's deposition was not

completed by October 31, 2015, her testimony would be excluded from the hearing. Service Corp. failed to meet the deadline. On December 11, Service Corp. applied ex parte for one more opportunity to include Dr. Josephson's testimony. The arbitrator allowed Service Corp. to produce Josephson for a deposition and to testify at the arbitration hearing. Dr. Josephson was deposed on December 30, 2015. At the start of the arbitration hearing, defendants confirmed they would be calling Dr. Josephson. However, as the hearing progressed, defendants' counsel informed the arbitrator they would not call Dr. Josephson as a witness. During the discussion to add a half day to the arbitration, defendants never raised the issue that they required more time to call their witnesses.

At the hearing on defendants' motion to vacate the arbitration award, the trial court asked defendants' counsel:

"But how do I – your request that I vacate the judgment because [the arbitrator] refused to hear evidence and exceeded her authority because you weren't allowed to present Dr. Josephson and the other nurses How do I review a discretionary decision by the arbitrator when there is apparently no [reporter's] transcript? What I have are declarations from both sides, . . . where you presented the arguments concerning what additional evidence you wanted to provide"

The court noted the parties disputed whether defendants had voluntarily withdrawn Dr. Josephson as an arbitration witness. After hearing argument, the court ruled:

"[T]he burden of proof is on the defendants to show that they were substantially materially prejudiced or that somehow Judge Chirlin did not appropriately act on their request to reopen . . . the arbitration in order to submit and show evidence. [¶] On

this record, I don't think [defendants have] met [their] burden. I think that on this record, Judge Chirlin was faced with this question, brought it to her attention properly, and she considered it, and she denied it. And I don't think I have to second-guess – I may be wrong about that – it may be completely de novo – it may be that I have to look at it completely de novo – but I don't think on this record where she knew the case, she knew the evidence, she mentioned the decision, she mentioned in her opinion that it was this request for additional evidence, and she rejected it; and in the absence of a transcript, . . . and given that I had only the dueling declarations [of counsel], it seems to me that I can't find that you, the defendant, was denied the right to present evidence that substantially [prejudiced] [*sic*].”⁸

We agree that Country Villa and AG Facilities did not carry their burden of proving their rights were substantially prejudiced by the arbitrator's refusal to hear material evidence. First, Country Villa and AG Facilities did not provide the trial court or this court a proper record on which to evaluate prejudice. (See *Jameson v. Desta* (2018) 5 Cal.5th 594, 608-609 [“it is a fundamental principle of appellate procedure that a trial court judgment is ordinarily presumed to be correct and the burden is on an appellant to demonstrate, on the basis of the record presented to the appellate court, that the trial court committed an error that justifies reversal of the judgment”].) “An error made by a trial court must be prejudicial to be reversed. An error is prejudicial where there is a good probability, in the absence of

⁸ At the later hearing on plaintiffs' motion to confirm the arbitration award, the trial court declined to reconsider the rulings made at the hearing on defendants' motion to vacate the award.

the error, the result to the appellant would have been more favorable.’ [Citation.]” (*Lu v. Grewal* (2005) 130 Cal.App.4th 841, 852.) Without a record of the oral arbitration proceedings, we cannot determine whether there is a good probability that, had the arbitrator heard the additional evidence Country Villa and AG Facilities wished to present, they would have received a more favorable result.

Second, even if we assume the conflicting declarations of counsel create a sufficient record for review, substantial evidence supports the trial court’s finding that the arbitrator did not deny Country Villa and AG Facilities the right to present material evidence. Plaintiffs’ attorney Flint declared that defendants voluntarily withdrew Dr. Josephson as a witness. Flint also declared that at no point during the discussion adding a half day to the arbitration did defendants argue they lacked sufficient time to present their case, a fact confirmed by the arbitrator in her written award. We conclude the trial court did not err by declining to vacate the award under Code of Civil Procedure section 1286.2, subdivision (a)(5).

DISPOSITION

The judgment is amended nunc pro tunc to reflect that the Patient's Bill of Rights claim has been dismissed with prejudice. As amended, the judgment is affirmed. Plaintiffs Patricia Porter, through her successor in interest Linda Solis, and Linda Solis, individually, are entitled to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JASKOL, J.*

WE CONCUR:

BAKER, Acting P. J.

MOOR, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.